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No. 85-148

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

BLUE CROSS AND BLUE SHIELD OF MICHIGAN,
a nonprofit Michigan corporation,

Appellant,

—against—

WILLIAM G. MILLIKEN, Governor of the State of Michigan, FRANK J. KELLEY, Attorney General of the State of Michigan, and NANCY A. BAERWALDT, Commissioner of Insurance of the State of Michigan,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

MOTION TO DISMISS

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QUESTIONS PRESENTED

I.

WHETHER THE TAKING OF PRIVATE PROPERTY INTERESTS WITHOUT JUST COMPENSATION ARGUMENT NOW ADVANCED BY BLUE CROSS AND BLUE SHIELD OF MICHIGAN, ON BEHALF OF ITS NON-DIRECTOR MEMBERS, WAS PRESENTED TO OR DECIDED BY THE MICHIGAN SUPREME COURT.

II.

WHETHER A TAKING OF PRIVATE PROPERTY WITHOUT JUST COMPENSATION COULD OCCUR IN THE CASE OF A TAX-EXEMPT QUASI-PUBLIC CORPORATION WHOSE MEMBERS TOOK THEIR POSITIONS SUBJECT TO STATUTORY AND JUDICIAL LIMITATIONS IMPOSED BY MICHIGAN LAW.

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INTRODUCTION

Blue Cross and Blue Shield of Michigan (BCBSM) appeals from a decision of the Michigan Supreme Court upholding the constitutionally of Public Act 350 of 1980. Specifically, BCBSM challenges several sections as effecting a taking of a property right without just compensation. The property taken, claims BCBSM, belongs to the corporate membership and is alleged to include: the rights to select the Board of Directors, to amend the articles of incorporation and bylaws, and to determine its own composition and succession.

The State of Michigan brings this Motion to Dismiss Appeal pursuant to U.S. Supreme Court Rule 16.1(b) and (d).

COUNTERSTATEMENT OF THE CASE

Exactly which sections of 1980 P.A. 350 BCBSM is challenging is not entirely clear. BCBSM filed virtually the identical Jurisdictional Statement with the Honorable Sandra Day O'Connor on June 24, 1985, in support of its application for a stay pending final disposition of its appeal. In that application, BCBSM sought a stay only as to Sections 203, 301(7), 302(1), 305(1) and 701(1). Application for Stay of Judgment, ¶4, at 2. These sections BCBSM characterized as "the corporate control provisions." With respect to its Proposed Jurisdictional Statement, BCBSM stated: "As will be seen from an examination of that Statement, BCBSM is confining its appeal to a constitutional attack on the corporate control provisions of PA 350." *Id.*, ¶6, at 4.

However, under the heading "Constitutional Provisions and Statutes Involved", the Jurisdictional Statement be-

gins by reciting the provisions of an additional six sections of 1980 P.A. 350: 301(1)-(6), but then sums up by mentioning only Sections 203, 301(7), 302(1) and 305(1) as effecting a taking. Because of the ambiguity, this Motion will assume that eleven sections are under attack.

THE NATURE OF THE CORPORATE MEMBERSHIP

BCBSM alleges a taking of private property rights held by the "corporate membership." At the outset, it is important to describe the nature of the BCBSM corporate membership referred to in this appeal. Prior to 1974, when Blue Cross and Blue Shield were separate corporations, the term "member" was synonomous with director or trustee. In 1974, the legislature passed Public Acts 48 and 49 which amended the Blue Cross and Blue Shield statutes to permit the two corporations to consolidate. Pursuant to those acts, in order to consolidate the two corporations, it was necessary for the Blue Cross Trustees and the Blue Shield Directors to adopt a Plan of Consolidation to be submitted to the Insurance Commissioner for approval. The Plan was required to set forth the manner and means of converting the membership of each corporation into the consolidated membership. The Plan also had to specify the number, qualifications and identity or method of selection of the first Board of Directors of the consolidated corporation and provide for representation from the public, the medical profession and the participating hospitals on the Board.

The Plan of Consolidation submitted to the Commissioner provided for the 44 Blue Cross Trustees to join the 36 Blue Shield Directors along with an additional 11 members to be selected by the Blue Shield Board and one additional member to be selected by the Blue Cross Trustees, for a total of 92. The President and Chairman were to

be ex-officio, bringing the total to 94.[1] Technically, speaking, this became the corporate membership.

The current Board of Directors consists of one-half of the corporate membership and is commonly referred to as the Board of Directors. It is the remaining non-director members that are commonly referred to as the corporate membership. However, because it appears that BCBSM is here using the term corporate membership to refer to all 93 members, for purposes of this brief when referring to the non-director members, the term "corporate body" will be used.

It is not an interference with the claimed rights of the membership as a whole that BCBSM is actually contesting, but rather the alleged rights of the non-director members of the corporate membership. For example, the vesting of the exclusive right to amend the bylaws in the Board of Directors has obviously not infringed any claimed rights of the members of the Board of Directors. Only the non-director members have been affected.

Similarly, the individual members must be distinguished from their constituent groups. These constituent groups are responsible for selecting representatives to sit on the Board and corporate body and include, by way of example, hospitals, M.D.'s, D.O.'s, labor unions, large groups, small groups, and appointees of the Insurance Commissioner. The distinction between the members and their constituent groups is important because, in support of the alleged property right claimed on behalf of the indi-

[1]

The Chairman of the Board is currently selected from the members of the Board instead of in addition thereto, which serves to reduce the membership to 93.

vidual members, BCBSM appears to be arguing the contributions made by the constituent groups. For example, BCBSM states:

> It is quite evident, moreover, that BCBSM's members expected tangible benefits from their investment of time, money and effort in BCBSM's future. All constituent groups which comprise BCBSM's membership have an intense economic interest in BCBSM's destiny. . . .Thus, all of the constituent elements of BCBSM's corporate membership have vitally important economic interests in BCBSM—interests which motivated them to invest many years of service and hard work in the enterprise.

Jurisdictional Statement at 23.

However, the constituent groups are not disenfranchised in any way by 1980 P.A. 350 or the sections thereof that are challenged. Representatives of the constituent groups continue to sit on the Board of Directors, and continue to elect the Board and control the articles and bylaws. Thus, the taking arguments advanced by BCBSM are actually being asserted on behalf of individual members of BCBSM's corporate body; not as they sit in their capacity as representatives of various constituent groups, but rather in their individual capacity.

These individual members of the corporate body, claims BCBSM, have an ownership interest arising out of their "investment" in the company. The "investment" these individual members have in BCBSM is illusory. The members of the corporate body meet once annually during an all-expenses paid stay at a resort. They may also serve on board committees which meet at various times throughout the year. However, they are paid for attendance at

these meetings. Further, none of the members has a pecuniary interest in BCBSM, nor do any of their predecessors have such an interest. The record below indicates, 422 Mich. at 47, that the initial capital for both corporations was advanced as *a loan* which was repaid.

ARGUMENT

I

THE QUESTION RAISED BY BCBSM IN THIS APPEAL WAS NOT PRESENTED, BRIEFED, OR PASSED UPON BY THE MICHIGAN SUPREME COURT

While BCBSM's claim on behalf of the membership is interesting, it is also the first time that it has been raised. Throughout the unique procedural history of this case, BCBSM never contended in state court that sections 203, 301(1)-(7), 302(1), 305(1) and 701(1) divested private property interests of the individual corporate members in violation of the due process clause. Instead, BCBSM advanced the claim that a variety of sections of 1980 P.A. 350, when considered together, acted to turn a private corporation into a public one, thus depriving *BCBSM* of liberty and property without due process.

The proceedings below began with a Complaint for Declaratory and Injunctive Relief filed March 19, 1981 (1b-7b). The only reference to a due process claim under the Fourteenth Amendment appeared in paragraph 7:

> 7. The operative effect of P.A. 350, as a whole, as well as various individual sections thereof, violate the Michigan Constitution of 1963 and the Constitution of the United States of America. The Act is illegal and unconstitutional in the following respects, among other things:
>
> * * *
>
> (b) Said Act, and/or portions thereof, violates Article I, Section 17 of the Michigan Constitution of 1963, and

> the Fourteenth Amendment to the United States Constitution, by depriving BCBSM of liberty and property without due process of law;

No factual development accompanied this statement and the Complaint contained no reference to specific sections of the Act. This type of pleading is deficient under the Michigan General Court Rules which require.

"a statement of facts without repetition upon which the pleader relies in stating his cause of action with such specific averments as are necessary reasonably to inform the adverse party of the nature of the cause he is called upon to defend. . . . ."GCR 1963, 111.1 (now MCR 2.111(B)(1)).

The Complaint filed by BCBSM failed to meet this requirement. BCBSM apparently sought to augment its Complaint with a Motion for Preliminary Injunction and a Brief in Support filed contemporaneously with the Complaint. The Motion referred to due process claims with respect to the sections at issue in this appeal in the following manner:

> 4. P.A. 350 as a whole, as well as various sections therein, as applied to Plaintiff, violates the Michigan Constitution of 1963 and the Constitution of the United States of America, more particularly:
>
> * * *
>
> (d) Sections . . . 301(1)-(5), 301(7), 302, 305(1), . . . in whole or in part, deprive BCBSM of liberty and property without due process of law by effectively trans-

forming a private corporation into a governmental entity, in the guise of regulation;

(e) Sections . . . 301(1)-(5), 301(7), 302, . . . 305(1), . . . in whole or in part, deprive BCBSM of liberty and property without due process of law by regulating BCBSM in a discriminatory, arbitrary and unreasonable manner which bears no real and substantial relation to the object of the legislation and by imposing unduly burdensome and oppressive restrictions on the operation of a legitimate business

The Brief in Support of the Motion tracked this presentation. Argument B.3. discussed the Due Process claims as follows:

3. P.A. 350 DEPRIVES BCBSM OF LIBERTY AND PROPERTY WITHOUT DUE PROCESS OF LAW

(a) P.A. 350 EFFECTIVELY TRANSFORMS A HERETOFORE PRIVATE CORPORATION INTO A GOVERNMENTAL ENTITY

(b) P.A. 350 REGULATES BCBSM IN A DISCRIMINATORY, ARBITRARY AND UNREASONABLE MANNER WHICH BEARS NO REAL AND SUBSTANTIAL RELATION TO THE OBJECT OF THE LEGISLATION

(1) P.A. 350 ARBITRARILY AND DISCRIMINATELY PROHIBITS BCBSM FROM ENGAGING IN CERTAIN LINES OF BUSINESS WHICH IT HAS HERETOFORE LAWFULLY PERFORMED

(2) P.A. 350 IMPOSES UNDULY OPPRESSIVE AND BURDENSOME RESTRICTIONS ON

THE OPERATION OF A LEGITIMATE BUSINESS

(3) P.A. 350 ARBITRARILY AND UNREASONABLY DISCRIMINATES BETWEEN THOSE ENTITIES PERFORMING SIMILAR SERVICES

(c) P.A. 350 UNCONSTITUTIONALLY DELEGATES LEGISLATIVE AUTHORITY AND PROVIDES FOR ADMINISTRATIVE PROCEDURES LACKING IN DUE PROCESS GUARANTEES AND PROTECTIONS

(1) P.A. 350 DELEGATED LEGISLATIVE AUTHORITY WITHOUT SUFFICIENT STANDARDS TO GUARD AGAINST THE EXERCISE OF UNBRIDLED DISCRETION

(2) P.A. 350 DEPRIVES BCBSM OF GUARANTEED PROCEDURAL DUE PROCESS

(d) P.A. 350 WRONGFULLY COMPELS THE PUBLIC DISCLOSURE OF BCBSM'S TRADE SECRETS AND OTHER CONFIDENTIAL INFORMATION

As among these claims, the only ones which could be said to encompass the taking argument now advanced on behalf of the corporate membership are 3(a) and 3(b). Of those sections of 1980 P.A. 350 apparently challenged in this appeal, only 301(1)-(5), 301(7), 302(1), and 305(1) were mentioned in these arguments. Sections 203, 301(6) and 701(1) were not discussed. Moreover, the challenges raised were the following:

301(1) — Board of Directors composition dictated by statute and control removed *from BCBSM*; (emphasis added.)

301(2) — Governor of Michigan given, through his appointees, four seats on the Board of Directors;

301(3)-(5) — Board Composition legislatively mandated and control removed *from BCBSM*; (emphasis added.)

301(7) — BCBSM, its officers, directors and members all deprived of participation in selection of Board of Directors and thereby of all essential control over the Corporation;

302(1) — Legislatively mandated Board now controls By-Laws and the Corporate Membership is stripped of its historical power and authority to direct the corporate activities of BCBSM;

305(1) — Governor given further authority to appoint members of corporate body and removes control of its composition *from BCBSM*. (Emphasis added.)

BCBSM Brief in Support of Preliminary Injunction at 35

Examined out of context, Section 302(1) above could arguably be said to raise the argument now advanced; however, as was true with BCBSM's final Brief to the Michigan Supreme Court, the discussion of 302(1) centered on the claim that its provisions, when taken together with other sections of P.A. 350, transformed a private entity into a public one:

> "The combination of the policy formulation duties imposed on BCBSM, the imposition of executive appointees sitting on the Board of directors and comprising a portion of the corporate membership, the removal of the power and authority of BCBSM to select its directors and corporate membership and thereby control the affairs of the corporation, and the imposition of the Commissioner of Insurance as sort of a Super-Board of Directors, with final decisional authority over nearly every meaningful action taken by BCBSM, when considered *en masse*, clearly amount to a deprivation *of BCBSM's* private nature and autonomy and transforms BCBSM into some form of public entity. (Emphasis added).

BCBSM Brief in Support of Preliminary Injunction at 36.

Significantly, not once in the 77-page state court brief does BCBSM allege *on behalf of the membership* a taking of property without just compensation. The work "taking" never appears. "Just compensation" is never mentioned.

On April 2, 1981, Judge Warren enjoined the enforcement of 1980 P.A. 350, but with this caveat: "(The foregoing Order is not to be taken as any determination on the merits.)" (131a).

The case then came to the Supreme Court in a unique way. On December 28, 1981, BCBSM informed the Commissioner of Insurance that it was raising its Blue Shield rates 95% without her approval. During the course of the State's appeal of that action, the Michigan Supreme Court, *sua sponte* and on its own motion, assumed jurisdiction of the instant case and ordered briefs submitted within eight days. (Order of February 25, 1982, 8b). BCBSM objected, arguing that the court should await an executive message

from the Governor certifying specific questions to the court for determination. The court agreed to postpone action until April 5, 1982. (Order of March 3, 1982, 9b-10b).

Thereafter, the parties met with the Governor's counsel and agreed upon eleven questions to be submitted to the court. (11b-13b). Pursuant to Michigan General Court Rule 797.1(a), the Michigan Supreme Court directed the Ingham County Circuit Court to "certify the controlling question or questions of public law involved . . . with a statement of the facts relevant thereto sufficient to make clear the application of the question or questions."

> If the circuit court concludes that it cannot state the relevant facts without having conducted evidentiary hearings, the circuit court shall so inform this Court . . . specifying which of the certified questions requires factual determinations made after an evidentiary hearing and the factual issues relevant to each such question."

Order of March 25, 1982 (134a).

Pursuant to that Order, Ingham County Circuit Court Judge Jack W. Warren certified nine questions, including the following due process question:

> 7. Does the Act convert BCBSM to a government agency? If so, does it unconstitutionally *deprive BCBSM* of liberty and property?
> (Emphasis added.)

(139a).

Among the factual inquiries listed by the Judge as relevant to Question #7, the only ones which touched upon the corporate membership were the following:

(d) Historically, who has had the power to control the corporate structure of BCBSM?

(e) Historically, who has had the power to elect the corporate members and directors of BCBSM?

(144a).

During the summer of 1982, Judge Warren conducted evidentiary proceedings and at the close submitted Findings of Fact to the Michigan Supreme Court. On December 21, 1982, the Michign Supreme Court directed the parties "to file briefs . . . *addressing the certified questions*." (14b-15b). Thus, the question before the court was the one formulated by Judge Warren, whether 1980 PA 350 transformed BCBSM into a governmental entity and, if so, whether that deprived BCBSM of liberty and property without due process.

BCBSM responded by arguing that 1980 P.A. 350 transforms BCBSM from a private corporation into a government entity by imposing upon it governmental duties and by allowing the Governor to make four public appointments to the Board of Directors and four to the corporate body, as opposed to the Insurance Commissioner's appointment of two public members to the Board and two to the corporate body. This "transformation," contended BCBSM, constituted a taking. The argument was presented in the following context. On pages 11-17 of its Brief to the Michigan Supreme Court (16b-22b). BCBSM contended:

II

PA 350 Deprives BCBSM of Liberty and Property Without Due Process of Law by Converting a Heretofore Private Corporation into a Public, Governmental Corporation

* * *

A.

PA 350, in Effect, Constitutes a Governmental Take-Over of BCBCM

* * *

B.

PA 350 Makes BCBSM a Form of Public, Governmental Corporation

* * *

C.

Converting BCBSM from a Private Corporation to a Public, Government Corporation is Plainly Unconstitutional

Arguments II A and B focused on the claim that BCBSM was, for the first time, being asked to assume governmental responsibilities. The governmental appointees were argued to be a "glaring indicia" of governmental status. (19b). Another indicia of governmental status was alleged to be "the deprivation of the basic right to determine the composition of its own governing bodies." "[W]hen considered *en toto*", BCBSM complained, "[these indicia] clearly amount to a governmental take-over of BCBSM, creating in its stead, a form of public, governmental corporation." (20b).

It was in this context that BCBSM began its discussion of an alleged taking under Part II C of its argument. The focus of the argument was on the alleged conversion from a

private to a public entity and *separate private property rights of the membership were never alleged.*

The provisions of 1980 P.A. 350 that BCBSM argued in support of its taking claim were, said BCBSM, listed on pages 443a-444a of the BCBSM appendix. (25b-26b). These pages are titled: "SECTIONS OF PA 350 EFFECTIVELY TRANSFORMING BCBSM INTO A FORM OF PUBLIC, GOVERNMENTAL CORPORATION." Significantly, sections 203, 301(6) and 701(1) are not mentioned in this list. In fact, sections 301(6) and 701(1) were not challenged by BCBSM for any reason.

Not once in the due process discussion did BCBSM argue that transferring from the membership to the Board of Directors the right to elect the Board of Directors, to amend the articles of incorporation and bylaws, and to self-perpetuate constitutes a taking of the *private property rights* of the *membership*. Thus, the Michigan Supreme Court noted: "BCBSM points to no discernible monetary or other equitable interest of the members in BCBSM." *Id.* at 47. The argument now advanced that the members of the corporate body, through the hard work of representing their constituent groups at one annual meeting per year and a few committee meetings throughout the year, have thereby developed an ownership interest in BCBSM, was not only not raised below, it has never been publicly articulated prior to now.

Had BCBSM meant to raise such an argument, it certainly knew how to do it unambiguously, as evidenced by the arguments raised under the Contract Clause. The Contract Clause challenge was presented in two ways:

(1) as a claimed violation of BCBSM's contract (its corporate charter) with the state; and (2) as an impairment of private vested contract rights held by the membership. It was in this latter context that the provisions of sections 203, 301(7), 302(1) and 305(1) were briefed by the parties and discussed by the court. 23b-32b: BCBSM's list of challenged sections). Consequently, the court's discussion of these sections throughout its opinion primarily focuses on whether they constitute a substantial impairment of any contract rights.

In the State's brief response, and in keeping with BCBSM's presentation, sections 301(7), 302(1) and 305(1) were discussed in the following context:

> 1980 PA 350 DOES NOT IMPAIR ANY PRIVATE VESTED CONTRACT RIGHTS
>
> * * *
>
> BCBSM claims impairment of contract rights "vested" in the Board of Directors and corporate body. Chief among these is a claimed contract right of the corporate body to self-perpetuate, as delineated in the current articles of association and bylaws. The addition to the Board of Directors of two additional public appointed directors and two additional members to the corporate body, is said to destroy these claimed rights. The transfer of bylaw ratification power from the corporate body to the Board of Directors is similarly claimed to impair vested contract rights.

Defendants' brief at 32.

In response to BCBSM's due process challenge, the State pointed out that where a valid exercise of the state's

police power is involved (i.e. regulation), there is no taking. In meeting what the Michigan Supreme Court characterized as BCBSM's "shotgun approach," 422 Mich. at 24, fn 23, the State discussed sections 203, 301(1)-(5), 301(7), 302(1), and 305(1), not because they were briefed by BCBSM on this point, but because they were listed at various places in BCBSM's appendix. Again, in keeping with the way they were presented in the appendix, the focus was on whether these sections served to turn a heretofore private entity into a public one. The focus was not on any asserted private rights of the members.

In complete contrast to the claim made here, BCBSM responded:

> Defendants discuss in this portion of their Brief Sections 301, 302, 304, 305 and 505-513. *BCBSM did not claim due process violations with respect to these individual sections and is at a loss as to why Defendants discuss these sections in this regard.*

Reply Brief of Plaintiff at 34. (Emphasis added.)

This statement is even more significant in light of the BCBSM statement that:

> Following discovery, the hearings below and the Circuit Court's Findings of relevant Facts, BCBSM has greatly narrowed some of the initial questions presented, and has dropped altogether several individual challenges to particular Sections of PA 350.

Brief of Plaintiff at xiii.

Thus, *by BCBSM's own admission*, it did not raise due process challenges with respect to 301(1)-(5), 301(7), 302(1) and 305(1). Moreover, as previously noted, 301(6) and

701(1) were not even challenged by BCBSM in the Michigan Supreme Court, and 203 was only briefed by BCBSM as part of its argument on impairment of private contract rights.

In its opinion, the Michign Supreme Court addressed the due process challenge by stating the question as it was presented to the Court *by BCBSM*:[2]

> DOES PA 350 DEPRIVE BCBSM OF LIBERTY AND PROPERTY WITHOUT DUE PROCESS OF LAW BY EFFECTIVELY CONVERTING A HERETOFORE PRIVATE CORPORATION INTO A PUBLIC, GOVERNMENTAL CORPORATION?
>
> BCBSM attacks 1980 PA 350 on the ground that certain mandatory provisions of the act, in effect, consitute a government takeover of BCBSM by transforming it from a "private" corporation into an agency of the state government in violation of due process of law.

422 Mich. at 43.

After thus stating its understanding of BCBSM's challenge, the court began its analysis with the following observation:

> We reject BCBSM's argument on the ground that BCBSM's construction of the act is overblown and unsubstantiated as compared with what the statute actually provides. By examining BCBSM's allegations line by line against the exact statutory language of the

[2] Defendants accepted BCBSM's Statement of Questions Presented.

> act, the fallacy in BCBSM's interpretation becomes clear.

Id. at 44.

In analyzing BCBSM's claim that by mandating the composition of the Board of Directors the legislature has removed from BCBSM its control over board structure, the court did mention sections 301(1)-(5), 301(7) and 305(1), but again in the context of whether these sections constitute a governmental takeover of BCBSM. *Id.* at 45.

Additionally, the court did discuss section 302(1), but this came in the context of BCBSM's claim that transferring the authority to amend, adopt or repeal bylaws from the corporate members to the Board of Directors takes property *from BCBSM* without due process because it removes control over BCBSM's corporate direction *from BCBSM* and places it in the hands of the government. *Id.* at 46-47.

It is axiomatic that an appeal to this Court from a decision of a state Supreme Court lacks a jurisdictional basis if the questions sought to be reviewed were not presented, argued, and passed upon by the state court. BCBSM's appeal of matters not raised, briefed, argued or ruled upon below may be explained by changes in legal counsel, but it cannot be excused.

II

1980 P.A. 350 COULD NOT EFFECT A TAKING OF PRIVATE PROPERTY WITHOUT JUST COMPENSATION BECAUSE BCBSM IS NOT A PRIVATE ENTITY AND THE MEMBERS TOOK THEIR POSITIONS SUBJECT TO STATUTORY AND JUDICIAL LIMITATIONS IMPOSED BY MICHIGAN LAW

A. BCBSM IS NOT A PRIVATE ENTITY.

In support of its claim, BCBSM relies heavily on the assertion that it is a *private* company and that 1980 P.A. 350 effects a taking of *private* property. Thus, the issue of the nature of BCBSM is central to its claim. This issue has already been decided by the Michigan Supreme Court. In *Westland Convalescent Center* v. *BCBSM and Commissioner of Insurance*, 414 Mich. 247, 264; 324 N.W. 2d 851 (1982), the majority labeled BCBSM a quasi-public entity: "We recognize the unique position held by BCBSM. Created by special legislation, it functions as a *quasi-public*, tax-exempt institution." (Emphasis added.)

Special legislation to create and enable BCBSM was necessary because of the unique nature of the plans. Under the early prepayment plans, first conceived in Texas, subscribers could receive services only at the particular hospital that had organized the prepayment program. In Texas, this type of arrangement was not considered "insurance," but rather a group contract for the sale of service by the hospital to the subscribing members. R. Rorem, "Enabling Legislation for Non-Profit Hospital Service Plans," 6 Law and Contemporary Problems 528, 529 (1939). When "free choice" plans emerged, which allowed subscribers to choose their hospital at the time of illness, they were considered to be insurance and in New York and Ohio were told to incorporate as insurance companies. S.

Law, Blue Cross: "What Went Wrong" (University of Pennslyvania, Health Law Project) (2 ed 1976) 7 (hereinafter "Health Law Project"). In Michign, the Michigan Attorney General rendered a similar analysis. *See generally* OAG, 1937-1938, p. 236 (May 14, 1937).

Thereafter, special enabling legislation ensued not only in Michigan, but eventually in all states. This legislation varies from state to state. Thus, while BCBSM may argue that Blue Cross plans in other states are private entities, Jurisdictional Statement at 18 n 10, those determinations have no bearing on the status of Blue Cross and Blue Shield of Michigan.

Moreover, an early Blue Cross pioneer and the man generally recognized as developing the "model" plan after which BCBSM was patterned, Dr. C. Rufus Rorem, described such plans in the following way:

> Hospital service plans are unique, historically and geographically. American prepayment plans have no counterparts in other times or other countries. They are not private business, yet they involve individual initiative and leadership. They are not government activities yet they perform an essential public service.
>
> Hospital service plans do not compete with the legitimate field of private insurance, as they deal with a service which has long been recognized as a community responsibility. Hospital care must be provided for all persons regardless of their ability to pay. Such a responsibility cannot and should not be assumed by a private insurance company, the first concern of which should be the financial interests of the policyholders and stock holders. . . .

Rorem, *Non-Profit Hospital Service Plans*, (Chicago: Commission on Hospital Service) (1940) at 92.

The quasi-public nature of certain corporations was recognized in Michign as early in 1852 when the Michigan Supreme Court defined three types of entities: public, private and quasi-public:

> The *object*, defines the *character* of these associations, and by whatever name they may be styled, their rights and liabilities, . . .
>
> The object of *strictly private* corporations is to aggregate the capital, the talents, and the skill of individuals, to foster industry and encourage the acts. Private advantage is the ultimate, as well as the immediate object of their creation. . . .
>
> [I]t is obvious, that the *object* which determines the character of a corporation is that *designed* by the legislature, rather than that *sought* by the company.

Swan v. *Williams*, 2 Mich. 427, 435 (1852) (emphasis in original). *See also Kent County Agricultural Society* v. *Houseman*, 81 Mich. 609; 46 N.W. 15 (1890).

BCBSM is not a private entity, as described in *Swan* v. *Williams*, *supra*. In order to be termed "private," BCBSM's primary object would have to be the private interest of its "corporators," of which it presently has none. Similarly, other jurisdictions have defined a private corporation as: "[O]ne which is organized for the transaction of its own business and for the furtherance of private ends, and is distinguished from a public or quasi-right, or duty." *Corrigan* v. *Coney Island Jockey Club*, 2 Misc. 512; 22 N.Y.S. 394 (1983), or one "formed for the benefit of its stockholders exclusively." *Forbes Pioneer Boat Line* v. *Board of Commissioners of Everglades Drainage District*, 77 Fla. 742; 82 So. 346, 350 (1919), or "those the direct object of which is to promote private interests, and in

which the public has no concern, except the indirect benefits resulting from the promotion of trade and the development of the general resources of the country. They derive nothing from the government, except the right to be corporations and to exercise the powers granted." *Coco* v. *Riverside Irr Co.*, 142 La. 10; 76 So. 216, 218 (1917).

BCBSM was not organized for the furtherance of private ends. It was not organized to make profits. It has no shareholders or bondholders whose interests or investment it must protect. It has no contributors to surplus (contingency reserve) other than its subscribers. It has no members in the sense that a nonprofit corporation has. Instead, it operates as the Michigan legislature's response to a broad social and economic problem in an area traditionally reserved to government—the assurance of adequate and affordable health care to the people of Michigan.

In order to enable BCBSM to carry out its unique role, it has been granted considerable benefits and competitive advantages by the state. In an effort to keep the rates charged to subscribers as low as possible, the legislature made the plans non-profit, tax-exempt, charitable and benevolent.

It is exempt from the Insurance Code and the General Corporations Code except where specifically provided. The exemption from the Insurance Code also meant exemption from both the $1 million capital requirement imposed on insurance companies and the requirement of high reserves. This was possible because instead of providing cash indemnity, the plans instead provide service. In order to do this, the enabling legislation authorizes the plans to enter into a dual contractual arrangement with the providers on one side and subscribers on the other. This ability to contract with both sides of the health care equation enables BCBSM to negotiate a discount with both

hospitals and physicians which, when combined with its non-profit, tax-free status, gives BCBSM a 15% cost advantage over private commercial insurers. 2 McNerney, *Hospital and Medical Economics: A Study of Population, Services, Costs, Methods of Payment, and Controls* 1072 (1963) (currently the discount in Michigan runs closer to 20%). Another cost advantage of the Blues plans was the fact that marketing of the plans was to be done by employees paid by salary rather than by agents paid by commission. Health Law Project, *supra*, 199 n 32.

Until recently, Blue Cross and Blue Shield of Michigan both recognized and welcomed its unique role and status. In 1961, Blue Cross described itself as patterned after the following guidelines:

> 1. *Such plans must be organized and operated as a PUBLIC SERVICE.*
>
> 2. The plans must cover hospital services only and not the professional services of attending physicians.
>
> 3. The plans should seek the advice and counsel of physicians and of lay persons *primarily interested in the public welfare.*
>
> 4. The patient's right to freedom of choice of hospital and physician should be preserved.
>
> 5. Plans should be organized and operated as non-profit entities.
>
> 6. Plans should be operated on an economically sound basis.
>
> 7. Plans should encourage participation by all hospi-

> tals of standing in the community and should be organized and promoted in a dignified and ethical manner.

Michigan Hospital Service (Blue Cross), Status and Operation of Michigan Hospital Service: A Report Submitted to the Honorable Frank Blackford, Commissioner of Insurance, State of Michigan, in support of an application for adjustment of Blue Cross subscriber rates, at 26 (1961) (emphasis added). *See also* M. Norby, *Hospital Service Plans: Their Contract Provisions and Administrative Procedures*, 6 L. & Contemp. Prob. 545 (1939).

The Michigan physician community similarly recognized the public responsibility of medical service corporations. William J. Burns, Executive Secretary of the Michigan Medical Society, noted that the purpose of the new medical service corporation was to assist "those in the lower income groups to obtain needed medical services." Burns, *The Michigan Enabling Act For Non-Profit Medical Care Plans*, 6 L. & Contemp. Prob. 559 (1939).

In 1973, Michigan Blue Shield characterized itself as "a public service company," and noted the following:

> In 1946, United States Senator Arthur Vandenberg characterized Michigan Blue Shield as "a public trust." Though the medical care field and the prepaid health insurance field have changed dramatically through the years, that single aspect of trust has not been altered. Michigan Blue Shield will continue to handle the public funds entrusted in its care in the most efficient and judicious manner possible.

The history and treatment of BCBSM show that, contrary to its claim in the instant appeal, it is not a private com-

pany, but rather a quasi-public service corporation designed to assure reasonable access, cost and quality of health care services for the people of Michigan. It was this role that the Michigan Supreme Court recognized in *Westland Convalescent Center, supra.*

Hoping to obtain a different result in this case, BCBSM repeatedly asserted its claim to the Michigan Supreme Court that it is a private entity. The State contended, as it always has, that BCBSM is a quasi-public entity. The court, in its opinion, found it unnecessary to revisit the issue of BCBSM's status. In adopting the balancing test articulated by this Court in *Energy Reserves Group, Inc.* v. *Kansas Power & Light Co.*, 459 U.S. 400; 103 S.Ct. 698; 74 L.Ed.2d 569 (1983), for contract clause analysis, the Michigan court found that the test applied regardless of whether BCBSM is a private or quasi-public entity. "Consequently," said the court, "the question of BCBSM's corporate nature is not paramount to our resolution of the Contract Clause challenge. . . ." 422 Mich. at 20.

Similarly, the Michigan court did not reach the private/quasi-public issue when it ruled on BCBSM's due process claims because, fundamentally, it found that the regulation did not rise to a taking. To now find the taking asserted by BCBSM, this Court would have to pass upon the uniquely local issue of the character of BCBSM and find it to be a private entity in the face of a Michigan Supreme Court decision to the contrary.

In addition to the claim that it is a private entity, also central to the taking argument now advanced is BCBSM's assertion that 1980 P.A. 350 chops through the entire bundle of property rights held by the non-director members and that this fact distinguishes the instant case from *Andrus* v. *Allard*, 444 U.S. 51; 100 S.Ct. 318; 62 L.Ed.2d 210 (1979), and *Penn Central Transportation Co.* v. *New*

York City, 438 U.S. 104; 98 S.Ct. 2646; 57 L.Ed.2d 631 (1978). The corporate membership, argues BCBSM , "has retained nothing." First, as this Court has repeatedly stated:

> Property interests are not created by the Constitution, "they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law. . . ."

Cleveland Board of Education v. *Loudermill*, 470 U.S. ___; 105 S.Ct. 1487; 84 L.Ed.2d 494, 501 (1985), quoting *Board of Regents* v. *Roth*, 408 U.S. 564, 577; 92 S.Ct. 2701; 33 L.Ed.2d 548 (1972).

The Michigan courts have never held that non-director members of this unique quasi-public entity have a property interest in their positions. However, assuming a property interest for the sake of discussion, BCBSM's assertion is incorrect. 1980 P.A. 350 continues to allow members of the corporate body to serve on committees of the Board of Directors where a significant amount of policy is formulated. Section 305(2) (288a). Further, as is the present policy, a member of the corporate body may be selected for membership on the Board of Directors. *Id.* While corporate body participation may have been curtailed, it has not been eliminated.

B. THE MEMBERS' REASONABLE EXPECTATIONS DID NOT INCLUDE THE PRESERVATION OF THE STATUS QUO.

BCBSM repeatedly cites in support of its position *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. ___; 104 S. Ct. 2862; 81 L.Ed.2d 815 (1984). It is unclear how that opinion supports BCBSM's claim that the individual members of

the corporate body have suffered a taking. Even assuming a property interest for the sake of discussion, still left to be determined is the issue of the reasonable expectations of the members that their postions were insulated from state legislation. As the majority opinion in *Ruckelshaus* notes:

> Thus, as long as Monsanto is aware of the conditions under which the data are submitted, and the conditions are rationally related to a legitimate government interest, a voluntary submission of data by an applicant in exchange for the economic advantages of a registration can hardly be called a taking.

81 L.Ed.2d at 835.

Similarly, the dissenting opinion focuses on the issue of reasonable expectations, notably stating: "If one thing is quite clear it is that the extent of Monsanto's pre-1972 expectations, whether reasonable and investment-backed or otherwise, is a heavily factual question." *Id.* at 846.

The issue of the reasonable expectations of the BCBSM members has already been considered by the Michigan Supreme Court. Although discussed in the context of the Contract Clause challenge, the court nonetheless noted: "The members took their position with knowledge of the regulatory powers of the state over the corporation's bylaws." 422 Mich. at 32.

Moreover, while BCBSM complains that 1980 P.A. 350 reduces the size of the Board of Directors from 47 to 35, that the corporate body is now restricted to 70, and that these provisions oust 23 members, BCBSM fails to advise this Court that it was they who first proposed to the legislature many of the provisions they now challenge. House Bill 4340 (Defendant's Exhibit 101 below), introduced on

March 15, 1979, was produced by BCBSM[3] and provided that the Board of Directors would be reduced to 28 *members*: 20 to represent consumers, 7 to represent providers, plus the president of the corporation. *Id.* § 205(12).

The bill went on to specify that of the 20 consumer members selected, 9 would be representatives of large groups, 8 would represent small groups, and 3 would represent individuals. *Id.* § 206.

Three individual subscriber representatives were to be appointed by the Governor, Senate Majority Leader and Speaker of the House. *Id.* § 207. Within 120 days the Board was required to restructure itself or reconsitute *a new board*. The system of selection proposed was to be forwarded to the Commissioner for approval. *Id.* §§ 207(2) and (3).

Like 1980 P.A. 350, House Bill 4340 would have vested the right to determine the membership of the Board of Directors and the composition of the bylaws in the Board. It even went further, however, and *completely eliminated* all 47 non-director members, replacing them instead with "six regional customer advisory councils," the memberships of which were to be determined by the Governor, Senate Majority Leader, Speaker of the House, and the *restructured or new* Board of Directors. *Id.* §§ 210-215.

The provisions of 1980 P.A. 350 that BCBSM complains of are less harsh than those that BCBSM proposed. It is difficult for BCBSM to suggest that the members had a reasonable expectation in the status quo in light of the fact

[3]
Hollister and Drake, The Nonprofit Health Care Corporation Reform Act of 1980, 14 Mich. J.L. Ref. 433, 435 (1981): "In the spring of 1979, the Blues' management came to Representative William Ryan and me requesting us to introduce their version of a rewrite of P.A. 108 and 109."

that it was BCBSM itself which went to the legislature and suggested that all 47 members of the corporate body be eliminated. BCBSM invited legislation on these very points.

C. THE MEMBERS TOOK THEIR POSITION SUBJECT TO THE PROVISIONS OF MICHIGAN LAW.

Finally, at the time BCBSM's original enabling legislation was passed, the Michigan Supreme Court had already declared that: "A statute changing the right of voting for trustees from the members of a charitable corporation, as provided in the charter, to the board of trustees itself is within the power of the legislature." *Stott* v. *Stott Realty Co.*, 288 Mich. 35, 44; 284 N.W. 635 (1939).

The corporate membership assumed their positions subject to these statutory and judicial limitations created by state law.

RELIEF

The State of Michigan respectfully requests that this Court either dismiss or summarily dispose of BCBSM's appeal.

Respectfully submitted,

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Dated: August, 1985

APPENDIX

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Verified Complaint

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

BLUE CROSS AND BLUE SHIELD OF MICHIGAN, a non-profit Michigan Corporation,

Plaintiff,

vs. Case No.

WILLIAM G. MILLIKEN, GOVERNOR OF THE STATE OF MICHIGAN, FRANK J. KELLEY, ATTORNEY GENERAL OF THE STATE OF MICHIGAN, NANCY A. BAERWALDT, COMMISSIONER OF INSURANCE OF THE STATE OF MICHIGAN,

Defendants

VERIFIED COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

Plaintiff, Blue Cross and Blue Shield of Michigan (hereinafter "BCBSM"), by its attorneys, BUTZEL, LONG, GUST, KLEIN & VAN ZILE, brings this action to obtain declaratory, injunctive and other equitable relief against Defendants and states:

1. This is a proceeding for declaratory relief pursuant to GCR 1963,521, for the purpose of determining a question of actual controversy between the parties hereto, and for preliminary and permanent injunctive relief pursuant to GCR 1963, 718.

2. BCBSM is a private corporation organized under the laws of the State of Michigan on February 1, 1975, pursuant to a statutorily authorized consolidation of Michigan Hospital Service of Michigan and Blue Shield of Michigan, which corporations were theretofore separate entities incorporated on October 3, 1938 and August 1, 1939, respectively. Since its inception, Plaintiff has been engaged in the business of, among other things, providing prepaid health care benefits and is at the present time engaged in said business.

3. BCBSM is a private corporation engaged in the business of, among other things, marketing health care coverage for over five million residents of the State of Michigan, pursuant to contracts between BCBSM and its customers, arranging for the marketing and packaging of other forms of insurance to subscribers in conjunction with the marketing of health care coverage, providing administrative services to employer customers who furnish health care coverage to their employees and contracting with health care providers for the furnishing of health care services to individuals covered under contracts between BCBSM, and its customers. BCBSM. and its two predecessors, have engaged in some or all of the above activities continuously for over forty (40) years.

4. Defendants herein are the Governor of the State of Michigan, the Attorney General of the State of Michigan, and the Commissioner of Insurance of the State of Michigan. Each of the foregoing state officials are charged by law with the enforcement and administration of various aspects by Act 350, Public Acts of Michigan 1980, as amended by Act 430, Public Acts of Michigan, 1980, ("P.A. 350"), (MCLA 550.1101 et. seq.) and each has an interest in this proceeding and the issues involved herein.

5. BCBSM is informed and believes that the business which it owns and conducts is the only such business in the State of Michigan to which the provisions of P.A. 350 will apply.

6. P.A. 350 purports, among other things:

(a) to completely preclude certain aspects of BCBSM's business and severely restrict other aspects of BCBSM's business that it has heretofore engaged in, including, the total prohibition of its marketing arrangements of other forms of insurance in conjunction with the marketing of health care coverage and severely

restricting the performance by BCBSM of administrative services for self-insured customers;

(b) to fundamentally alter the existing relationship between BCBSM and the State of Michigan by totally depriving BCBSM the right to determine its own corporate structure and composition and by arbitrarily mandating the number and method of selection and election of its Board of Directors which shall include four (4) persons appointed at the discretion of the Governor of the State of Michigan;

(c) to fundamentally alter the relationship between BCBSM and its corporate members by depriving the latter of their existing right to elect the Board of Directors and otherwise control the organization and business of BCBSM;

(d) to fundamentally alter the relationship between BCBSM and its customers by impairing and eradicating existing contracts between same, depriving customers of certain contractual rights and services and by mandating the granting by BCBSM of other contractual rights and services to its customers which BCBSM neither agreed to nor bargained for;

(e) to fundamentally alter the relationship between BCBSM and health care providers by altering existing contracts between BCBSM and providers and by providing for

future structuring of such contracts by the Commissioner of Insurance;

(f) to impose upon BCBSM affirmative policy obligations which are lawfully the responsibility of and have heretofore been carried out solely by governmental entities;

(g) to single out and isolate BCBSM in the conduct of its business and regulate BCBSM in a manner wholly different from the regulation of others conducting the same or similar business in the State of Michigan;

(h) to effectively transform a private corporation into a quasi-public entity in the guise of regulation;

(i) to restrain and deprive BCBSM and its directors, officers and employees of guaranteed rights of free speech;

(j) to confer powers and authority on administrative officials without legally sufficient standards and procedural safeguards; and

(k) to subject BCBSM's business to the oversight and prior approval of administrative officials to such an extent as to confer upon administrative officials the power and authority to manage the corporate and business affairs of BCBSM under the pretext of regulation.

7. The operative effect of P.A. 350, as a whole, as well as various individual sections thereof, violate the Michigan

Constitution of 1963 and the Constitution of the United States of America. The Act is illegal and unconstitutional in the following respects, among other things:

(a) Said Act, and/or portions thereof, violates Article I, Section 5 of the Michigan Constitution of 1963 and the First Amendment to the United States Constitution, by restricting and infringing on guaranteed rights of free speech;

(b) Said Act, and/or portions thereof, violates Article I, Section 17 of the Michigan Constitution of 1963, and the Fourteenth Amendment to the United States Constitution, by depriving BCBSM of liberty and property without due process of law;

(c) Said Act, and/or portions thereof, violates Article I, Section 2 of the Michigan Constitution of 1963 and the Fourteenth Amendment to the United States Constitution, by depriving BCBSM of the equal protection of the law;

(d) Said Act, and/or portions thereof, violates Article I, Section 10 of the Michigan Constitution of 1963 and Article I, Section 10 of the United States Constitution, by impairing the obligation of both public and private contract rights; and,

(e) Said Act, and/or portions thereof, violates the Michigan Constitution of 1963 and the United States Constitution, by delegating governmental authority and functions to private persons.

8. P.A. 350 will become effective on April 3, 1981. Said Act will require a wholesale restructuring of BCBSM as well as wide-sweeping revisions of the manner in which it conducts business. Such revisions will entail the expenditure of millions of dollars and will vitally affect the over five million members of BCBSM. These alterations are of such a vast and fundamental nature that it would be impossible to restore the status quo should P.A. 350 be declared unconstitutional. BCBSM, its subscribers, customers and members will, therefore, suffer irreparable injury should the operation of P.A. 350 not be enjoined pending the outcome of this action, and is without an adequate remedy at law.

9. BCBSM avers that by reason of the foregoing, a present and substantial justicable controversy exists between BCBSM and defendants.

WHEREFORE, Plaintiff prays:

1. That this Court issue a declaratory judgment pursuant to GCR 1963, 521, that P.A. 350, as applied to Plaintiff, is unconstitutional and ineffective, and without force of law, and that Plaintiff is not required to comply with the terms and provisions thereof.

2. That BCBSM not be required to comply with the provisions of P.A. 350 and that Defendants, and each of them, their agents and servants, be preliminarily enjoined by the Order of this Court, from enforcing the provisions of P.A. 350, or otherwise applying same to Plaintiff, pending the final determination of the issues stated herein.

3. That Defendants, and each of them, their agents and servants, be permanently enjoined by Order of this Court, from enforcing the provisions of P.A. 350, or otherwise applying same to Plaintiff, following final determination of the issues stated herein.

4. That this Court grant to Plaintiff such further relief as it deems proper.

Donald G. Puscas

STATE OF MICHIGAN)
) SS.
COUNTY OF WAYNE)

On this date, personally appeared before me, a notary public, in and for said county and state, Donald G. Puscas, Senior Executive Vice President of Blue Cross and Blue Shield of Michigan, who deposes and says that he has read the foregoing Verified Complaint For Declaratory Judgment and Injunctive Relief so signed by him on behalf of Blue Cross and Blue Shield of Michigan, the corporation named herein, and knows well the contents thereof, and that the statements of fact therein contained are true to the best of his own knowledge, information and belief.

Notary Public, Wayne County
My Commission Expires: 5-2-82

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Dated: March 12, 1981

A TRUE COPY
LINGG BREWER
COUNTY CLERK

Order Granting Leave from Enjoining Enforcement of 1980

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 25th day of February in the year of our Lord one thousand nine hundred and eighty two. 3467-C

Present the Honorable

MARY S. COLEMAN
Chief Justice.

THOMAS GILES KAVANAGH
G. MENNEN WILLIAMS
CHARLES L. LEVIN
JOHN W. FITZGERALD
JAMES L. RYAN
BLAIR MOODY, JR.
Associate Justices

CR 37-79

BLUE CROSS AND BLUE SHIELD OF MICHIGAN, a Non-Profit Michigan Corporation,

Plaintiff,

v

SC: 68903
LC: 81-26748-CZ

GOVERNOR OF THE STATE OF MICHIGAN, ATTORNEY GENERAL OF THE STATE OF MICHIGAN, COMMISSIONER OF INSURANCE OF THE STATE OF MICHIGAN,

Defendants.

On order of the Court on its own motion, leave to appeal is GRANTED from the orders of the Ingham Circuit Court in case number 81-26748 dated April 2, 1981, enjoining the enforcement of 1980 PA 350, as amended, and dated July 31, 1981, directing the parties to comply with 1939 PA 108 and 1939 PA 109, as amended.

It is further ordered that this case be argued and submitted to the Court together with the case of Commissioner of Insurance v Blue Cross and Blue Shield of Michigan (Docket No. 68876) on March 5, 1982, at 3:00 p.m.

The parties are directed to file 24 copies of such briefs and papers heretofore filed in the Ingham Circuit Court as they wish to have considered by this Court, by 5:00 p.m. on March 1, 1982. In addition, the defendants may file 24 copies of such further briefs as they wish to submit by 5:00 p.m. on March 2, 1982, and the plaintiff may file 24 copies of such further briefs as it wishes to submit by 5:00 p.m. on March 4, 1982. The requirements of appendixes and printed briefs are waived.

STATE OF MICHIGAN — ss.

I, Harold Hoag, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court, at Lansing, this 25th day of February in the year of our Lord one thousand nine hundred and eighty two.

Clerk

Deputy

Order Vacating Briefing and Oral Argument

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN held in the Supreme Court Room in the City of Lansing, on the 3rd day of March in the year of our Lord one thousand nine hundred and eighty-two.

Present the Honorable

MARY S. COLEMAN
Chief Justice

THOMAS GILES KAVANAGH
G. MENNEN WILLIAMS
CHARLES L. LEVIN
JOHN W. FITZGERALD
JAMES L. RYAN
BLAIR MOODY, JR.
Associate Justices

CR 37-51
CR 37-79

COMMISSIONER OF INSURANCE,

Plaintiff-Appellant,

v

BLUE CROSS AND BLUE SHIELD OF MICHIGAN, a consolidated medical care and hospital service corporation,

Defendant-Appellee.

SC: 68876
CoA: 62626
LC: 82-28745

BLUE CROSS AND BLUE SHIELD OF MICHIGAN, a non-profit Michigan corporation,

Plaintiff,

v

GOVERNOR OF THE STATE OF MICHIGAN, ATTORNEY GENERAL OF THE STATE OF MICHIGAN, COMMISSIONER OF INSURANCE OF THE STATE OF MICHIGAN,

Defendants.

SC: 68903
LC: 81-26766

On February 25, 1982, it appearing to the Court that in Blue Cross and Blue Shield of Michigan v Governor of the State of Michigan, et al (Docket No. 68903), then pending in the Ingham Circuit Court, there were controlling questions of law of such public moment as to require early determination, this Court on its own motion granted leave to appeal from the orders of the Ingham Circuit Court enjoining the enforcement of 1980 PA 350 and directing the parties to comply with 1939 PA 108 and 1939 PA 109. In a separate order dated February 25, 1982, in Commissioner of Insurance v Blue Cross and Blue Shield of Michigan (Docket No. 68876) the Court granted the plaintiff's application for leave to appeal. The Court further ordered that these cases be argued and submitted together on March 9, 1982, at 3 p.m.

Blue Cross and Blue Shield of Michigan has filed and this Court has considered motions for reconsideration of the said orders of February 25, 1982, arguing inter alia that this Court lacks jurisdiction to take the action indicated in case No. 68903, that this Court should provide a period of time in

which the Governor might address to this Court an executive message requesting early determination of important public law questions involved in that case, and consenting, in part on terms and conditions specified, to the issuance of an order by this Court which would, for a period of time, prevent possible harm to the subscribers of Blue Cross and Blue Shield of Michigan and otherwise largely preserve the status quo during the pendency of this litigation. The Attorney General has filed responses to the motions, opposing any delay in the argument and submission of these cases and arguing inter alia that this Court is empowered to take the action which it did by the order of February 25, 1982, in case No. 68903.

Blue Cross and Blue Shield of Michigan having consented to the entry of an order regarding its unilateral increase in Blue Shield insurance rates for its individual lines of coverage (Nongroup, Group Conversion, and Other than Group Complementary), purporting to have been made effective February 1, 1982, prior to approval by the Commissioner of Insurance (the "rate increase"), IT IS ORDERED that Blue Cross and Blue Shield of Michigan may not, before April 5, 1982, (1) take any action to require payment by any subscriber of the rate increase, (2) cancel or terminate any subscriber because the subscriber has failed to pay the rate increase, or (3) cancel or terminate any subscriber for failure to pay the premium due February 1, 1982, before giving the subscriber 10 day's written notice that the subscriber need only pay the amount of the premium applicable before the rate increase. IT IS FURTHER ORDERED that Blue Cross and Blue Shield of Michigan shall notify former subscribers whose individual line coverage has lapsed or been cancelled since February 1, 1982, that the coverage may be reinstated by paying the charges due according to the rates in effect before the rate increase by March 15, 1982.

The Court takes under advisement the motions filed by Blue Cross and Blue Shield of Michigan to reconsider this Court's orders of February 25, 1982, the Attorney General's responses, and the proposal by Blue Cross and Blue Shield of Michigan that, after the receipt of an executive message under GCR 1963, 797.1(a) by March 15, 1982, it would cancel the rate increase and credit or refund to subscribers payments made pursuant to the rate increase, and would not cancel subscribers for failure to pay the rate increase or further increase rates without prior approval by the Commissioner of Insurance. The Court will take further action on these matters by April 5, 1982, regardless of whether an executive message has been received.

The portions of this Court's orders in these cases dated February 25, 1982, which provide for oral arguments on March 5, 1982, and for a briefing schedule in the case of Blue Cross and Blue Shield of Michigan v Governor of the State of Michigan, et al (Docket No. 68903), are VACATED until further order of this Court.

STATE OF MICHIGAN — ss.

I, Harold Hoag, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 3rd day of March in the year of our Lord one thousand nine hundred and eighty two.

Robin L Davis Deputy Clerk

Milliken's Executive Message

STATE OF MICHIGAN

Executive Office ★ Lansing

RECEIVED
MAR 15 1982
HAROLD HUAG
CLERK SUPREME COURT

IN THE SUPREME COURT OF MICHIGAN

EXECUTIVE MESSAGE OF WILLIAM G. MILLIKEN, GOVERNOR

The Honorable Chief Justice and Associate Justices of the Supreme Court:

William G. Milliken, Governor of the State of Michigan, pursuant to Rule 797 of the General Court Rules of 1963, respectfully advises the Court as follows:

There is presently pending in the Circuit Court for the County of Ingham the case of Blue Cross and Blue Shield of Michigan v William G. Milliken, Frank J. Kelley, and Nancy Baerwaldt, File No. 81-26748CZ. This action challenges the constitutionality of the Non-profit Health Care Corporation Reform Act of 1980 PA 350; MCLA 550.1101, et seq. That Act provides for the incorporation of non-profit health care corporations and enumerates their rights, powers, obligations, and immunities.

I have determined that the issues pending before the Ingham County Circuit Court in this case involve controlling questions of public law which are of such public moment as to require an early determination by the Supreme Court. Therefore, pursuant to GCR 1963, 797, I am by this executive message, respectfully requesting the Supreme Court to direct the Ingham County Circuit Court to certify to the Supreme Court the following issues for immediate determination.

1. Does there exist a contractual relationship between Blue Cross and Blue Shield of Michigan (BCBSM) and the State of Michigan and, if so, does the Act unconstitutionally impair that contract?

2. Does the Act unconstitutionally impair any private contractual rights which exist between BCBSM and its subscribers and between BCBSM and its members?

Milliken's Executive Message

STATE OF MICHIGAN

Executive Office ★ Lansing

3. Does the Act unconstitutionally delegate governmental authority and functions to BCBSM?

4. Does the Act include standards as reasonably precise as the subject matter of the legislation requires or permits so as to constitute a valid delegation of power to administrative and executive officials?

5. Does the Act unconstitutionally deprive BCBSM of equal protection of the law by regulating BCBSM in an arbitrary and discriminatory manner that bears no reasonable relation to the object of the legislation?

6. Does Section 301(7) of the Act unconstitutionally deprive BCBSM, its directors, officers and/or corporate members of guaranteed rights of freedom of expression

7. Does PA 350 of 1980 convert BCBSM to a government agency? If so, does that unconstitutionally deprive BCBSM of liberty and property?

8. Prior to the effective date of PA 350 of 1980 was BCBSM unlawfully entering into Administrative Services Only arrangements or marketing life insurance policies in conjunction with health care coverage?

9. Does the Act unconstitutionally deprive BCBSM of liberty and property without due process of law by:

   (a) prohibiting BCBSM from engaging in certain lines of business?

   (b) imposing unduly oppressive and burdensome restrictions on the operation of BCBSM's claimed legitimate business practices?

   (c) providing administrative procedures lacking in due process guarantees and protections?

Milliken's Executive Message

STATE OF MICHIGAN

Executive Office ★ Lansing

10. Does an actual controversy exist with regard to sections 205(b), 514, and 613 of 1980 PA 350, if plaintiffs initiated and actively supported the inclusion of these sections in the Act?

11. May a Circuit Court, without a full hearing on the merits, restrain the enforcement and effectiveness of a state statute, absent a showing that the statute is facially unconstitutional or that there is likely to be discriminatory enforcement of the statute?

So that these issues may be resolved at the earliest moment, I further urge this Court to expedite the hearing of these questions by scheduling an early briefing and argument.

Respectfully submitted,

William G. Milliken

William G. Milliken, Governor

Dated March 15, 1982

Order Directing Filing of Briefs

AT A SESSION OF THE SU ME COURT OF THE STATE OF M. IIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 21th day of December in the year of our Lord one thousand nine hundred and eighty two.

CR 37-79h

Present the Honorable
JOHN W. FITZGERALD, Chief Justice
THOMAS GILES KAVANAGH,
G. MENNEN WILLIAMS,
CHARLES L. LEVIN,
MARY S. COLEMAN,
JAMES L. RYAN,
DOROTHY COMSTOCK RILEY, Associate Justices

BLUE CROSS AND BLUE SHIELD OF MICHIGAN, a non-profit Michigan corporation,

Plaintiff,

v

SC: 68903
LC: 81-26748

GOVERNOR OF THE STATE OF MICHIGAN, ATTORNEY GENERAL OF THE STATE OF MICHIGAN, COMMISSIONER OF INSURANCE OF THE STATE OF MICHIGAN,

Defendants.

On March 25, 1982, after receiving the executive message from the governor under GCR 1963, 797.1(a), this Court directed the Ingham Circuit Court to certify the controlling question or questions of public law involved in the case of Blue Cross and Blue Shield of Michigan v Governor of the State of Michigan, et al (Circuit Court No. 81-26748), together with a statement of the facts relevant to the question or questions. The order provided that if the Ingham Circuit Court concluded that it could not state the relevant facts without having first conducted evidentiary hearings, it should specify which question or questions required factual determinations and the factual issues relevant to each, and include a proposed schedule for the evidentiary hearings and an estimate of the length of time required to conduct them. The circuit court filed its certification of the controlling questions of public law, a statement of the need to conduct evidentiary hearings and of the factual issues relevant to the controlling questions, and a proposed schedule of evidentiary hearings.

The circuit court has filed its statement of the relevant facts following the evidentiary hearings. The parties are directed to file briefs in accordance with GCR 1963, 854-857 addressing the certified questions. For the purpose of applying the provisions of the rules regarding briefing schedules, this order shall be deemed an order granting leave to appeal, plaintiff Blue Cross and Blue Shield of Michigan shall be deemed the appellant, and the defendants shall be deemed the appellees.

Order Directing Filing of Briefs

STATE OF MICHIGAN — ss.

I, Harold Hoag, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 21st day of December in the year of our Lord one thousand nine hundred and eighty two.

Jacqueline B. Thorne Clerk.
Deputy

BCBSM's board of directors is already consumer dominated. The board already represents a broad cross-section of the subscribers of BCBSM and participting health care providers. The current chairman of the board was originally a Commissioner of Insurance nominee! The board's most out-spoken critic (also a Commissioner nominee) stated that he votes with the majority of the board a majority of the time. That fact alone affirmatively demonstrates that the BCBSM board of directors has struck the balance between the competing interests on the side of consumers. Again, the *factual* proofs offered by BCBSM and the Findings of the Circuit Court preclude any finding of reasonableness or necessity with respect to PA 350's deprivation of BCBSM's right to determine its own corporate structure, to select its own governing bodies and to determine its own corporate destiny. (Findings 86, 95, 102, 104, 116-123; App 126a-131a)

4.

Conclusion

BCBSM, through its incorporation in 1975, has a contractual relationship with the State of Michigan. PA 350 fundamentally impairs that contract by altering the nature and purposes of BCBSM, by legislatively mandating the structure and composition of BCBSM, and by depriving BCBSM of its right to determine its own corporate structure and to select its own governing bodies.

As a matter of law, police power regulations impairing contractual rights can only be sustained if demonstrated to be both *reasonable and necessary* for an important public purpose. PA 350 cannot reasonably be sustained as a legitimate exercise of the police power.

II.

PA 350 Deprives BCBSM of Liberty and Property Without Due Process of Law by Converting a Heretofore Private Corporation into a Public, Governmental Corporation

The Michigan Legislature has the power and authority to create a public corporation or governmental agency to

provide a health care financing system in the State of Michigan. The Legislature may not, however, transform an existing private corporation into a virtual governmental, public corporation to accomplish this purpose, without running afoul of the Due Process Clause of the Michigan (Article I, Section 17) and United States Constitutions (Fourteenth Amendment).

A.

PA 350, in Effect, Constitutes a Governmental Take-Over of BCBSM

The wide-sweeping revisions mandated by PA 350, the imposition of governmental responsibilities on BCBSM, and the vesting in the Commissioner of Insurance of imperial authority over all meaningful business decisions of BCBSM, constitute, in practical effect, a governmental take-over of BCBSM. The pertinent provisions are set forth in pages 443a-444a of the Appendix.

By PA 350, the Michigan Legislature has charged BCBSM with the responsibility for formulating and managing a health care system for the State under the superintending control of the Commissioner of Insurance. It has created a legislatively mandated board of directors, with some seats guaranteed to various legislatively determined constituencies and others to political appointees. It has removed from BCBSM control over its composition, structure and corporate direction. It has imposed on BCBSM the governmental responsibility of ensuring for *all people in the State* access to health care benefits at a fair and reasonable cost. The Commissioner of Insurance is given peremptory power and authority over the managerial affairs of BCBSM, controlling: what lines of business it writes; what kinds of certificates it writes; all charges for those certificates; BCBSM's contracts with its participating providers; and all methods of provider reimbursement. These provisions of PA 350, when considered *en masse*, amount to a governmental coup.

B.

PA 350 Makes BCBSM a Form of Public, Governmental Corporation

In assessing the true nature of the entity created by PA 350, the following remarks of this Court are instructive:

> We must, as has been stated, look behind the name to the thing named. We must examine its character, its relation, and its functions to determine indeed, whether it is an agency or instrumentality of State government. This examination leads us to a consideration of the *purposes* sought to be accomplished by the law. *If those purposes are public purposes, if the work of the entity is a public work, then the State housing development authority is a State agency or instrumentality.* . . . (emphasis added) *Advisory Opinion re Constitutionality of PA 1966, No 346*, 380 Mich 554, 571 (1968).

The purpose clause of PA 350 (Section 102) is directly tied to the general health and welfare of the people of this State. The Insurance Code of 1956, pursuant to which all other domestic insurers in this State are incorporated, does not even contain a purpose clause, and the introduction thereto makes no mention of the general health, safety and welfare of the people of this State. (MCLA 500.1 *et seq*) Nor do the purpose clauses of Acts 108 and 109 of 1939 contain any reference to the general health, safety and welfare.

The current purposes of BCBSM, as expressed in its Restated Articles of Incorporation, merely provide: to exercise all the rights of medical care and hospital care corporations under Acts 108 and 109 of 1939 and to do all acts and things, and to carry on all business in connection and incident thereto not violative of the laws of the State of Michigan. (Finding 76; App 123a-124a)

In sharp contrast, compare the corporate purposes mandated by Section 202(1)(d) of PA 350:

> (ii) To secure for *all* of the people of this state who apply for a certificate, the opportunity for access to

coverage for health care services at a fair and reasonable price.

(iii) To assure for nongroup and group subscribers, reasonable access to, and reasonable cost and quality of, health care services.

(iv) To achieve the goals of the corporation relative to access, quality and cost of health care services, as prescribed in section 504.

* * *

(vi) (B) Actively represent in negotiations with the federal government and with providers of medical, hospital, and other health services for which benefits are provided under the federal medicare program, the interests of senior citizens as they relate to cost and quality of, and access to, health care services and administration of the program.

Significantly, the corresponding provision of the Insurance Code, MCLA 500.5008, imposes *no* mandatory purpose provisions for other domestic insurers incorporating in this State.

Examination of the purposes of PA 350, both as expressed in the Act and with respect to mandatory purpose clauses to be included in BCBSM's Articles of Incorporation, demonstrates a governmental purpose. These purposes are of an entirely different nature and stand in sharp contrast with the current purposes of BCBSM and other domestic insurers in this State. These public, governmental purposes are strong indicia that the BCBSM molded by PA 350 would in realty be a form of public, governmental corporation.

The phenomenon of governmental appointees on BCBSM's governing bodies is a glaring indicia of governmental status. *See: Board of Sup'rs Etc* v. *State Milk Commission*, 60 SE2d 35 (S Ct Va 1950); *State Licensing Bd of Con* v. *State Civil Serv Comm'n*, 110 So2d 847 (La App 1958), *affirmed*, 123 So2d 76 (1960).

The sweeping extent of governmental intrusion and control is yet another indicia of governmental take-over of BCBSM. *See*, e.g., *Goldblatt* v. *Hempstead*, 369 US 590, 594 (1961). The operative effect of PA 350 as a whole, is to strip BCBSM of inherent corporate authority that is universally recognized as the perogative of a private corporation. Most notable, is the deprivation of the basic right to determine the composition of its own governing bodies, together with the governmental enfranchising of all of BCBSM's customers in this regard. In addition, the Commissioner of Insurance is granted ultimate control over all essential aspects of BCBSM's business. BCBSM is not aware of any legislation enacted in the United States which so completely intrudes upon and interdicts the inherent right of a private corporation to manage and control its corporate business and affairs.

The above indicia, when considered *en toto*, clearly amount to a governmental take-over of BCBSM, creating in its stead, a form of public, governmental corporation.

C.

Converting BCBSM from a Private Corporation to a Public, Governmental Corporation is Plainly Unconstitutional

The Michigan Legislature could constitutionally create a governmental entity to manage a health care finance system in this State. But, to force a private corporation to become an instrumentality of the government, is a deprivation of liberty and property without due process of law.

In *Michigan Commission* v. *Duke*, 266 US 570 (1924), the Supreme Court held unconstitutional a legislative act which effectively converted a private carrier to a public carrier. The Court held that such legislation deprived private carriers of liberty and property without due process of law.

> Moreover, it is beyond the power of the state by legislative fiat to convert property used exclusively in the business of a private carrier into a public utility, or to

> make the owner of a public carrier, for that would be taking private property for public use without just compensation which no state can do consistently with the due process clause of the 14th Amendment. *Id*, 266 US at 577-578

Accord: *Frost Trucking Company* v. *RR Comm*, 271 US 583 (1926).

Legislation need not constitute an overt taking or conversion to offend the due process clause. Onerous and burdensome regulation, interfering with managerial perogatives can also constitute a taking in violation of due process rights. *Goldblatt* v. *Hempstead, supra*, 369 US at 594. The imposition of new, public duties and the interference with management perogatives has been held to constitute an unconstitutional deprivation of liberty and property without due process of law.

In *Nicoma Park Telephone Co* v. *State*, 180 P2d 626 (S Ct Okla 1947), the Oklahoma corporation commissioner ordered a telephone company to expand its service to the entire state. In holding such order unconstitutional, the court stated:

> The fact that it is a public utility does not necessarily cast upon it the duty of serving the public at large. . . . While the appellant is employing its resources and property in a public service, it must be remembered that these still remain its private property, and that the public cannot assume the role of general manager, and require such property to be used in a service to which the owner has not voluntarily dedicated it . . .
>
> Regulation must not be so far extended as to constitute management or operation . . . (citations omitted) *Id*, 180 P2d at 629

More recently, in *Hartford Acc & Indem Co* v. *Ingram*, 226 SE2d 498 (S Ct NC 1976), the court declared unconstitutional an act requiring certain insurers to offer health care liability policies.

> Assuming without deciding, that the State of North Carolina has an obligation to provide some equitable method whereby those whom it licenses to practice one of the healing arts may procure insurance against liability for injuries caused by their negligence in such practice, it does not necessarily follow that the State has power to conscript certain persons or corporations, or a certain group thereof, and require such draftees to supply the need at their risk or expense.
>
> * * *
>
> Of course, the business of writing insurance against liability for personal injury and property damage is such that the State may lawfully regulate it in the public interest. This is axiomatic. It does not follow, however, that one engaged in such business in this State is subject to whatever regulation thereof the State may see fit to impose. *Id*, 226 SE2d at 505, 507

As in the above cases, PA 350 goes far beyond mere regulation in the public interest. The effect of PA 350 is to convert BCBSM into a public, governmental corporation, virtually controlled and managed by the government. In so doing, PA 350 contravenes the due process clauses of the Michigan and United States Constitutions.

III.

PA 350 Constitutes an Unconstitutional Delegation of Legislative Authority

The Michigan Constitution (Article 4, Section 1) provides that the legislative power shall be vested in the Legislature. A necessary corollary of this provision, and the fundamental doctrine of separation of powers, is that legislative responsibility and authority may not be delegated. *Panama Refining Co* v. *Ryan*, 293 US 388 (1935). PA 350 unconstitutionally delegates legislative authority to BCBSM and to other private persons.

PA 350 foists upon BCBSM the legislative task of formulating a health care finance system for *all persons* in the

SECTIONS OF PA 350 FUNDAMENTALLY ALTERING THE NATURE AND PURPOSES OF BCBSM

202(2)(d)(ii)	BCBSM is legislatively mandated to supply health care coverage to <u>all</u> persons of the state at a fair and reasonable cost. (No comparable duty exists under present law)
202(2)(d)(iii)	BCBSM is legislatively mandated to assure <u>all</u> subscribers access to quality medical care at a reasonable cost. (No comparable duty exists under present law)
203	The power to amend the articles of incorporation is taken away from the corporate membership (Finding 79) and vested in the legislatively mandated board of directors, on which government appointees will sit.
205	Removes managerial discretion and control with respect to contingency reserves, lines of business and risk factors and places control of these in the Commissioner of Insurance.
301(1)	Legislatively mandates a board of directors of 35 persons. (Currently, BCBSM has 47 directors, Finding 95)
301(2)	The governor of the State of Michigan is granted intrusive managerial authority over BCBSM by the power to appoint 4 persons to BCBSM's board of directors.
301(3)-(5)	Legislatively mandates the structure and composition of the board of directors. (Currently, BCBSM, in its Bylaws, controls the structure and composition of the board of directors, Finding 95)
301(7)	The power and right to elect the directors is removed from the corporate membership (Finding 96) and vested instead in BCBSM's customers.
304(1)	All directors, including the government appointees, are vested with the power and duty to make public minutes of the board of directors meetings when requested by a subscriber. (Currently, board minutes are not subject to public inspection, Finding 111)
305(1)	The governor of the State of Michigan is granted the further power to appoint members of the corporate body of BCBSM. The power and right to elect the corporate members is taken from the corporate membership (Finding 90) and vested instead in BCBSM's customers.
401	BCBSM is legislatively mandated to offer health care benefits to <u>all</u> residents of the State of Michigan. (No comparable duty exists under present law)

PA 350 Sections Altering BCBSM

504(1)	BCBSM is legislatively mandated to assure subscribers reasonable access to, and reasonable cost and quality of health care services. (No comparable duty exists under present law)
505-513	The Commissioner of Insurance is granted control over provider contracts and methods of provider reimbursement.
607-608	The Commissioner of Insurance is vested with prior approval authority over all rates, rating methodology and virtually all subscriber certificates and riders.

SECTIONS OF PA 350 EFFECTIVELY TRANSFORMING BCBSM INTO A FORM OF PUBLIC, GOVERNMENTAL CORPORATION

202(1)(d)(ii)	Purpose of BCBSM must be to secure for all people of this State the opportunity for access to health care services at a fair and reasonable cost.
202(1)(d)(iii)	Purpose of BCBSM must be to assure subscribers, reasonable access to, and reasonable cost and quality of health care services.
205(5)	The Commissioner of Insurance granted authority to define BCBSM's lines of business and to assign risk factors to each line of business.
205(10)	The Commissioner of Insurance granted authority to develop and order implementation of plans to bring BCBSM contingency reserves in line with the range legislatively mandated in Section 205.
217	The assets of BCBSM escheat to the State upon dissolution.
301(1)-(5)	The composition of BCBSM's board of directors is legislatively mandated.
301(2)	The governor is given, through his/her appointees, four seats on the BCBSM board of directors.
301(7)	BCBSM, its officers, directors and corporate members deprived of their rights to meaningful participation in the selection of the board of directors.
302(1)	BCBSM's corporate membership is stripped of its historical power and authority over the Bylaws of BCBSM and thereby to control the corporate activities of BCBSM.
304(1)	BCBSM board meeting minutes opened to public inspection.
305(1)	Composition of BCBSM's corporate body is legislatively mandated and the governor, through his/her appointees, is given four additional seats on the corporate membership.
401(7)	BCBSM mandated to contract with State owned and tax dollar supported state mental institutions, provided they meet with certain requirements.
504(1)	BCBSM must assure subscribers reasonable access to, and reasonable cost and quality of health care services.
505-513	The Commissioner of Insurance is granted control over provider contracts and methods of provider reimbursement.

PA 350 Sections Transforming BCBSM

607 Commissioner of Insurance granted prior approval authority over virtually all certificates offered by BCBSM.

608 Commissioner of Insurance granted prior approval authority over all rates, methodology, rating systems, formulas, components and factors used to calculate rates.

SECTIONS OF PA 350 UNCONSTITUTIONALLY DELEGATING LEGISLATIVE AUTHORITY TO BCBSM AND OTHER PRIVATE PERSONS

202(1)(d)(ii)	BCBSM must secure for all people of the State the opportunity for access to health care services at a fair and reasonable cost.
202(1)(d)(iii)	BCBSM must assure all subscribers reasonable access to, reasonable cost and quality of health care services.
202(1)(d)(vi)(B)	BCBSM must "actively represent" the interests of all senior citizens as they relate to cost and quality of, and access to, health care services.
205(6)	Final decisional authority over the risk factors to be assigned to BCBSM's lines of business is vested in three itinerant actuaries, with no provision for administrative or judicial review.
504(1)	BCBSM must assure reasonable cost of health care, assure there will be an appropriate number of providers throughout the state, and that providers will meet reasonable standards of health care quality.
505 - 513	BCBSM must develop plans that will assure reasonable cost, quality and access to health care services.
514	Appeals concerning provider class plans to be decided, de novo, by non-civil service "independent hearing officers."
613(1)	Appeals concerning rate matters to be decided by non-civil service "independent hearing officers."

SECTIONS OF PA 350 UNCONSTITUTIONALLY IMPAIRING PRIVATE, VESTED CONTRACT RIGHTS

203	Removes the power and authority vested in the corporate members to adopt and amend Articles of Incorporation and vests same in the new legislatively mandated board of directors.
206(4)	Voids BCBSM "Packaging" contracts with subscribers whereby related lines of commercial insurance are offered to subscribers in conjunction with BCBSM health care coverage.
211	Immediately voids ASO contracts with groups of under 500 subscribers entered into after September of 1980.
301(7)	Removes the power and authority vested in the corporate members to select the BCBSM board of directors and enfranchises BCBSM's customers in this regard.
302(1)	Removes the power and authority vested in the corporate members to adopt and amend Bylaws and vests same in the new legislatively mandated board of directors.
305(1)	Removes the power and authority vested in the corporate members to select the BCBSM corporate body and enfranchises BCBSM's customers in this regard.
509(4)(b)	Removes BCBSM's right to contractually control the share of provider costs it will reimburse and vests control over the share of provider costs BCBSM must pay in the Commissioner of Insurance.
510	Empowers the Commissioner of Insurance to void participating contracts between BCBSM and participating health care providers.
516(2)(b)	Removes BCBSM's right to contractually control the share of hospital costs it will reimburse and vests control over the share of hospital costs BCBSM must pay in the Commissioner of Insurance.

SECTIONS OF PA 350 DEPRIVING BCBSM OF LIBERTY AND PROPERTY WITHOUT DUE PROCESS OF LAW BY REGULATING BCBSM IN AN ARBITRARY AND DISCRIMINATORY MANNER WHICH BEARS NO REAL AND SUBSTANTIAL RELATIONSHIP TO THE OBJECTS OF PA 350 OR TO THE GENERAL HEALTH AND WELFARE OF THE PEOPLE OF THIS STATE

104(3)	"Certificate" defined to include ASO contracts.
206(4)	Prohibits BCBSM from packaging related lines of commercial insurance with BCBSM health care coverage.
211	Prohibits ASO contracts for groups of under 500 subscribers, voids existing ASO contracts with groups of under 500 subscribers if entered into after September of 1980, and places restrictions on ASO contracts for groups of over 500 subscribers.
217	Provides that the assets of BCBSM escheat to the State upon dissolution.
401(7)	Mandates that BCBSM subsidize State owned and tax dollar supported State mental institutions.
414a and 415	Mandated benefits must be included in ASO contracts.
502(1)(b)	Prohibits "per case participation" as it exists today.
607(1)	ASO certificates subject to prior approval of the Commissioner.

SECTIONS OF PA 350 DEPRIVING BCBSM OF LIBERTY AND PROPERTY WITHOUT DUE PROCESS OF LAW BY PROVIDING FOR ADMINISTRATIVE PROCEDURES LACKING IN FUNDAMENTAL DUE PROCESS GUARANTEES

402(7) When the Commissioner of Insurance has probable cause to believe BCBSM is violating Section 402(2), then he/she may order a hearing under Section 402(6). Under Section 402(7), if he/she still has probable cause to believe BCBSM is violating Section 402(2), he/she must issue a cease and desist order which carries a $I0,000 fine for violation.

404(5) When a subscriber complains that BCBSM has violated Section 402 or 403, the person is entitled to resolution of the dispute by the Commissioner pursuant to Section 404(3). If BCBSM is disatisfied with the Commissioner's determination, the Commissioner then conducts a contested case hearing under Section 404(5).

605 If the Commissioner determines that emergency action is required, he/she can summarily, without notice or hearing, suspend BCBSM's certificate of authority under Section 605(2). Under Section 605(5), that order can last up to 1 year and, after hearing, can be extended for yet another year.

701(5) If the Commissioner determines that BCBSM has failed to comply with Section 701, he/she may suspend BCBSM's right to do business without notice or hearing.

SECTIONS OF PA 350 DEPRIVING BCBSM OF LIBERTY AND PROPERTY WITHOUT DUE PROCESS OF LAW BY IMPOSING UNCONSTITUTIONALLY VAGUE AND ILLUSORY DUTIES ON BCBSM AND THE COMMISSIONER OF INSURANCE

106(5) "Objectives" defined as an expected achievement level by a health care corporation of the goals provided in Section 504. Insofar as is reasonably practicable, objectives shall be capable of quantitative measurement.

205(4) BCBSM must define at least five "lines of business."

205(5) Commissioner of Insurance may then, in his/her sole discretion, define 1 or more additional "lines of business."

310(1) Directors and officers of BCBSM owe a fiduciary duty to BCBSM and its customers.

401(1) Provides that BCBSM shall offer health care benefits to all residents of this State and may offer other health care benefits as approved by the Commissioner.

503 In the course of developing provider class plans, BCBSM shall "address" the issue of "uniform reporting" of health care providers.

504(1) BCBSM must assure subscribers "reasonable access to, and reasonable cost and quality of," health care services in accordance with the following goals:

a) There will be an appropriate number of providers throughout this State to assure the availability of services to subscribers;

b) Providers will meet and abide by reasonable standards of health care quality.

c) Providers will be subject to reimbursement arrangements that will assure a rate of change in total corporation payout per member to each provider class that is not higher than the compound rate of inflation and real economic growth.

509(1) Commissioner supposed to determine if BCBSM has substantially achieved the Section 504 goals and whether it has achieved the objectives.

509(4)(b) Commissioner supposed to consider the "overall balance" of the Section 504 goals and not focus on one goal independent of the others.

510(1) Commissioner can then determine to reject the provider class plan because it does not substantially achieve 1 of the Section 504 goals.

511(1)	BCBSM must then submit a new plan which substantially achieves the Section 504 goals and which achieves the objectives.
513(1)	Commissioner then reviews new plan to determine whether it substantially achieves the goals and achieves the objectives.